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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)
Achernar Broadcasting Company) MM Docket No. 86-440
Lindsay Television) File No. BPCT-860410KP
For Construction Permit For a New UHF) File No. BPCT-860410KQ
TV Station on Channel 64 at)
Charlottesville, Virginia)
To: The Commission)
_____)

COMMENTS OF SHENANDOAH VALLEY EDUCATIONAL TELEVISION

Jonathon D. Blake
Jennifer Johnson
Cara Maggioni
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044-7566
(202) 662-6000

*Counsel for Shenandoah Valley
Educational Television Corporation*

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COMMENTS OF SHENANDOAH VALLEY EDUCATIONAL TELEVISION

Pursuant to the Commission's Order, released June 28, 1999,¹ Shenandoah Valley Educational Television Corporation ("Shenandoah Valley") submits its comments and registers its strong objections to the most recent proposal put forth in the above-captioned matter. The above-referenced applications for a construction permit have been recast into the proposal currently pending before the Commission of a merged entity, Charlottesville Broadcasting Corporation ("CBC"). CBC seeks a construction permit for a new television station on the originally requested channel 64, or alternatively on channel 19 in Charlottesville, Virginia. The

¹ See Order, In re Applications of Achernar Broadcasting Company and Lindsay Television, Inc., For Construction Permit for a new Television Station, Channel 64, Charlottesville, Virginia, MM Docket No. 86-440; File No. BPCT-860410KP, File No. BPCT-860410KQ (released June 28, 1999)(hereinafter, "Order"), at ¶ 4.

alternative proposal for channel 19 is untimely, insufficient on the merits, and contrary to the public interest.

Granting the proposal to operate on channel 19, in addition, would be devastating to Shenandoah Valley and would decimate its ability to provide high-quality, noncommercial educational programming to its viewing public. Shenandoah Valley has an important stake in this proceeding because it operates a translator station, W19BB, on channel 19 in Charlottesville, Virginia (Albemarle County). CBC's proposal to use channel 19 in Charlottesville would destroy Shenandoah Valley's ability to provide its educational programming not only via its channel 19 translator to viewers in Charlottesville, but also through its main station to its viewing public in Virginia and West Virginia.²

I. Summary.

Shenandoah Valley opposes both CBC's proposal to use channel 19, rather than channel 64, and CBC's request for an immediate construction permit. The alternative proposal to operate on channel 19 is not merely an amendment to the original application for a construction permit, but rather an untimely request first to amend the analog Table of Allotments. CBC has once before requested permission to amend its application prior to a window of time to be determined by the Mass Media Bureau – a request that was denied by the Commission – and has been told that it must, like all similarly situated applicants, wait until the public notice opening such window. Further, any such amendment, according to the Commission's rules, requires a new rulemaking proceeding to offer all parties an opportunity to comment on the amendment and the critical issue of whether the allotment should be reserved for noncommercial use. CBC's

² As more thoroughly discussed in section III, *infra*, this translator, necessary because of the mountainous terrain of the coverage area, is vital to Shenandoah Valley's continuing ability to meet its educational and noncommercial mission as it allows Shenandoah Valley to reach a broader audience and base of financial support.

alternative proposal for a construction permit on channel 19 would also forego the important public debate on whether to assign the new allotment to CBC, which assignment, according to the Commission's rules, requires an opportunity for interested parties to comment and/or compete for such assignment. Ultimately, CBC's initial and still pending proposal to operate on channel 64 would cause the least disruption to existing services, and would provide new service to the Charlottesville area without destroying the highly-valued noncommercial programming provided by Shenandoah Valley. Shenandoah Valley stresses that preserving the current use of channel 19 is the most equitable decision and serves the best interests of the viewing public, not only in the greater Charlottesville area but across the states of Virginia and West Virginia.

II. CBC's Proposal is Untimely, Procedurally and Technically Defective, and Contrary to the Public Interest.

On June 24, 1998, CBC filed its proposal to be considered for assignment on channel 19 in the alternative to its request for assignment to channel 64.³ While styled as an "amendment" to the pending application for channel 64, this proposal in fact is an entirely new application and request for a new allotment. Above all, the amendment is untimely as it is before the timeframe the Commission has already stated that it will establish for such amendments. Beyond this, the proposal differs from the original applications in that it requests not only assignment of channel 19 (a major change requiring a good cause showing, local public notice, and new filing fees) but also allotment of channel 19 to Charlottesville (a request that requires a

³ See Supplement to Joint Petition for Approval of Settlement Agreement, For Leave to Amend Application and For Immediate Grant of Construction Permit, In re Applications of Achnar Broadcasting Company and Lindsay Television, Inc., For Construction Permit for a New Television Station, Channel 64, Charlottesville, Virginia, MM Docket No. 86-440; File No. BPCT-860410KP, File No. BPCT-860410KQ (received June 24, 1998)(hereinafter "Supplement").

rulemaking).⁴ CBC's showing as to the merits of assigning the channel to it is insufficient in its address of the procedural and technical deficiencies and the interests of the public.

A. CBC's Proposal Has Already Been Deemed Premature by the Commission.

CBC argues that the reallocation of channel 64 justifies its new allotment/assignment request styled as an amendment.⁵ Unfortunately, the record does not indicate any such intention on the part of the Commission. CBC relies upon the fact that the Commission reserved the opportunity for pending applicants to amend their applications and petitions to seek a channel below channel 60.⁶ The instant "amendment," which satisfies neither the procedural requirements for an allotment change nor an assignment change, was not the sort of grandfathering the Commission envisioned, and in any case the untimely request has already once been denied. The Commission noted in its Memorandum Opinion and Order on reconsideration of the reallocation of the 60 to 69 channels, that "Lindsay [(now CBC)], an applicant for a license on channel 64 in Charlottesville, Virginia, requests that we reconsider the portion of our decision that holds pending applications for the designated public safety channels until the Mass Media Bureau provides the opportunity for amendment of applications to seek

⁴ The rules for such applications provide that "[a] major change for TV broadcast stations authorized under this part [Part 73] is any change in frequency or community of license which is in accord with a present allotment contained in the Table of Allotments (73.606). *Other requests for change in frequency or community of license for TV broadcast stations must first be submitted in the form of a petition for rulemaking to amend the Table of Allotments.*" (italics added). See 47 C.F.R. §73.3572(a)(1) and (2).

⁵ See Consolidated Reply to Oppositions, In re Applications of Achernar Broadcasting Company and Lindsay Television, Inc., For Construction Permit for a new Television Station, Channel 64, Charlottesville, Virginia, MM Docket No. 86-440; File No. BPCT-860410KP, File No. BPCT-860410KQ (received July 27, 1998)(hereinafter, "Consolidated Reply to Oppositions") at 15.

⁶ See Id.

channels below 60..."⁷ The Commission refused this request and reiterated its intention to open a specific filing window for such amendments, stating "[w]e will provide applicants a later opportunity to amend their applications to seek a channel below 60."⁸ The Commission noted further with respect to another commenter's proposal to allow short-spacing in such situations, that "we will consider individual short-spacing waiver requests on a case-by-case basis in conjunction with affording an opportunity for amendment of applications to seek channels below 60."⁹ The Commission qualified that its denial of reconsideration was without prejudice to Lindsay's pending request to operate on channel 64, despite the ban on new applicants for the 60 to 69 channels.

Clearly, the Commission is aware of the concerns presented by CBC's alleged amendment, and indeed has already stated once that CBC, like others similarly situated, will be afforded the opportunity to apply for appropriate waivers at the appropriate time. The appropriate time, however, is not now. Until the Mass Media Bureau issues the public notice opening the window for amending CBC's and other similarly situated applicant's applications, setting the appropriate parameters and procedural safeguards that will apply to such amendments, CBC's request is untimely. There are innumerable complications and conditions to heed as to such amendments, and allowing CBC to avoid well-considered conditions to amendments would be imprudent and unfair to the numerous other similarly situated applicants who are waiting properly for the opening of the amendment window as directed by the Commission.

⁷ Memorandum Opinion and Order, In the Matter of Reallocation of Television Channels 60-69, the 746-806 MHz Band, ET Docket 97-157 (adopted October 5, 1998, released October 9, 1998), at ¶7 (hereinafter Memorandum Opinion and Order).

⁸ Id. at ¶11.

⁹ Id.

To review the timeline, faced with the Commission's original order stating its intention that a specific window be allotted for these amendments, CBC requested reconsideration. When its reconsideration was denied, CBC proceeded to amend its application despite the Commission's decision. Incredibly, CBC now asks for the Commission to ratify its circumvention of this twice repeated mandate.¹⁰ This request should be dismissed.

B. The Changes Requested by CBC Are Properly Addressed Through the Public Rulemaking Procedure.

The Commission has noted that although in the future it will establish a window for amending pending applications, "all conditions pertaining to the applications and rulemaking petitions will continue to apply. . ."¹¹ Therefore, beyond the timeliness concerns, CBC is precluded from requesting use of channel 19 because that channel has never been allotted to Charlottesville, Virginia in the analog Table of Allotments.¹² To seek use of channel 19 in Charlottesville, CBC must submit to the Commission a petition for rulemaking to amend the Table of Allotments.¹³ Citizens as well as potential competitors must be afforded the opportunity to contribute to the Commission's informed decision of whether to proceed with such an allotment, and indeed whether the channel should be allotted for commercial or noncommercial programming service. Indeed, for several years Shenandoah Valley has aggressively pursued options to preserve its Charlottesville service (*e.g.*, upgrading its translator to a full power

¹⁰ Shenandoah Valley also notes the Commission's determination in the DTV proceedings that no applications for new NTSC stations may be filed after September 20, 1996, and no petitions filed after July 25, 1996, should be applied here. There is a strong argument that CBC's proposed amendment should be deemed time-barred, and in any case should not be ushered through without careful consideration and public debate as to the advisability of such an exception. See Sixth Further Notice of Proposed Rulemaking, 11 FCC Rcd 10968 (1996).

¹¹ See Report and Order, In the matter of Reallocation of Television Channels 60-69, the 746-806 MHz Band, at ¶40, ET Docket No. 97-157 (Adopted December 31, 1997, Released January 6, 1998).

¹² See 47 C.F.R. §73.607.

station), and if the Commission is prepared to allot a new channel to the Charlottesville area, Shenandoah Valley would strongly urge allotting the channel as a reserved channel for noncommercial use, for which Shenandoah Valley could apply in a proper assignment procedure that best serves the community's needs.

If the Commission, after a fully informed public debate, decided to grant the allotment to Charlottesville for commercial broadcast on channel 19, despite the devastating impact such allotment would have on Shenandoah Valley's educational and quality noncommercial service, only then should CBC apply for assignment of channel 19 for its operations. Section 309 of the Communications Act of 1934 clearly establishes that the procedures for assigning such channels must be competitive proceedings, and merely handing CBC the new channel without affording others the same opportunity directly violates this mandate. Not only must other applicants be given the opportunity to apply, but concerned parties should be afforded the right to register objections.¹⁴ While the allotment and assignment of one channel in a larger metropolitan area might not represent such a momentous decision, in Charlottesville, this amounts to handing fully one third of the market to one merged competitor simply because it asked, rather than competed for it in a public process.

CBC's proposal appears to represent an attempt to circumvent the process established by the Commission's rules without providing any justification for doing so. Granting a waiver of the required procedures for both allotment and assignment, notwithstanding that

¹³ See 47 C.F.R. § 73.3572.

¹⁴ CBC states that Shenandoah Valley failed to submit a sworn statement attesting to its need in its petition to deny, pursuant to 47 C.F.R. § 73.3584. See Consolidated Reply to Oppositions, at 13, n. 6. This is legally inaccurate. Since whether the application for channel 19 should be allowed to proceed at all is the issue, it would be inappropriate for Shenandoah Valley to file a petition to deny. If CBC files a proper application, or if the current application is allowed to

CBC has not properly asked for waiver of either, raises a significant danger of ignoring the public interest and the concerns generally raised in a rulemaking proceeding. This is particularly vital in a small community such as Charlottesville, not to mention that it would be exceedingly unfair to favor CBC at the expense of countless other potential and deserving applicants.¹⁵ The Commission should not accommodate this end-run around a vital public participation process.

C. CBC's Showing as to its Entitlement to the Channel through Amendment is Insufficient on the Merits.

Even if the Commission were to accept CBC's argument, and bypass the amendment window and the allotment rulemaking requirement to proceed on CBC's proposal, its request for assignment of channel 19 is procedurally defective under the major change amendment requirements. As stated above, CBC's proposal violates Section 73.607 of the Commission's rules on its face. For this reason alone, CBC's assertion that its proposal does not raise additional issues and that it therefore satisfies the good cause showing required by the (now amended) Section 73.3522(b) of the rules for post-designation amendments is incorrect. The foregoing discussion demonstrates that the issues in this proceeding have very much expanded, both from a public and potential competitor standpoint. Because its proposal raises these new issues, among others, CBC has not met the heightened good cause standard for major changes

proceed, all parties, including Shenandoah Valley, will be given the requisite notice and time to submit their petitions to deny at that time with appropriate sworn statements.

¹⁵ Shenandoah Valley has previously raised its concern with circumventing the rulemaking process for an allotment. See Objection of Shenandoah Valley Educational Television Corp. to Joint Petition for Approval of Settlement Agreement, For Leave to Amend Application And for Immediate Grant of Construction Permit, In re Applications of Achernar Broadcasting Company and Lindsay Television, Inc. for Construction Permit for a New Television Station, Channel 64, Charlottesville, Virginia, MM Docket No. 86-440, File No. BPCT 86041KP, File No. BPCT 860410KQ (received July 9, 1998). In response, CBC could only cite one instance where the Commission granted a change in channel in the midst of a proceeding. The Show Cause Order issued in that case assigned channel 16 rather than the initially requested channel 64 to a licensee in Providence. The situation is not analogous, however, for in that case, both channels had

that Section 73.3522(b) requires. Further, CBC has not demonstrated that it has served the requisite local public notice or paid additional filing fees.¹⁶

In addition, CBC concedes its use of channel 19 in Charlottesville would violate the DTV-to-NTSC distance separation requirements set forth in Section 73.623(d) because it would create a short-spacing to DTV channel 19 in Portsmouth, Virginia (WGNT). CBC purports that, with respect to WGNT, its proposed amendment would satisfy the applicable interference standards. Although the Commission has stated that it may consider such waiver requests on a case-by-case basis at the appropriate window in the future,¹⁷ CBC has not even made a showing of any compelling circumstances that might justify abrogation of the spacing requirements. Generally, applicants seeking waiver of the separation safeguards must first show, with particularity, that no fully-spaced or less short-spaced sites are available, and second demonstrate that on balance public interest factors justify operation from the short-spaced site.¹⁸ Not only has CBC demonstrated that it has a first choice fully-spaced alternative, channel 64, but on balance, the public interest weighs heavily against allotment of channel 19 and strongly favors preserving channel 19's current use. Here, an analog station is requesting a new channel, which has never been allotted, by means of an application that already circumvents a number of rules, solely to serve its own private, economic interests. The public sacrifices involved – the displacement of valuable noncommercial, educational programming, erosion of a long-standing commitment to quality noncommercial programming, and dilution of the valid reasons for granting such waivers – are too costly a price to pay.

already been allotted to Providence in the Table of Allotments. See Channel 16 of Rhode Island, Inc., 31 FCC 2d 574 (1971).

¹⁶ See 47 C.F.R. §73.3580(c).

¹⁷ See supra II.A.

Moreover, CBC asserts that where the minimum distance separations are not met, Section 73.623(c) sets forth the standards for determining that there will be no interference, and it asserts that its proposal satisfies those standards. It is clear that the cited provision of the rules does not apply where, as here, an applicant is requesting permission to operate a new NTSC rather than DTV station. The Commission has clearly stated that the *de minimis* interference exemptions are applicable only to the operation of DTV stations seeking to change initial DTV allotments and for stations operating on existing channels.

While Shenandoah Valley recognizes the equitable interests of accommodating CBC, surely accommodation does not require waiving all procedural hurdles. Rather, CBC must also shoulder its share of the burden in ensuring that the public interests and voice are served and heard as to when would be an appropriate time to amend this and all similarly pending applications.

III. The Public Interest and Interests of Equity are Best Served by the Preservation of Channel 19's Current Use.

The well established commitment to public television service would be undermined were the Commission to consider displacing Shenandoah Valley's translator by assigning channel 19, rather than channel 64, which assignment would allow both services to coexist. Shenandoah Valley's continued provision of its noncommercial, educational programming is clearly in the best interests of Charlottesville and surrounding Virginia and West Virginia communities. Since its inception in 1964, Shenandoah Valley has provided in-school programming to the schools within its service area, including a full schedule of over-the-air educational programs from 10 a.m. to 3 p.m., Monday through Friday, during the school year.

¹⁸ See Red Rock Broadcasting, Inc. v. FCC, 94 F.3d 698 (D.C. 1996).

CBC argues that one noncommercial television service (Richmond's channel 23 serving Charlottesville through a repeated transmitter) in the area is enough and asserts that there is little difference between the two services.¹⁹ On the contrary, while both channels provide high-quality educational and noncommercial programming, a review of a week's programming indicates substantial differences in programming. Shenandoah Valley's programming between the hours of 9 a.m. and 3 p.m. features dedicated children's educational programming, such as *Arthur* and the *Big Comfy Couch*, whereas Richmond's channel 23 showcases adult programming, such as the *Martha Stewart Show* and *Sew Many Quilts*. Obviously, the two different types of programming cannot substitute for each other, particularly in rural area classrooms where teachers rely upon Shenandoah Valley's programming, nearly 40 percent of which is dedicated to children, and upon Shenandoah Valley's frequent and ongoing utilization workshops for teachers. Further, while the two noncommercial services do provide similar programming at times, such programs are offered at different times by the two services, affording local viewers flexibility in their viewing times.

In addition, Shenandoah Valley, unlike the Richmond station, is uniquely connected to the Charlottesville community. As just a few examples, its programming includes, *Living in Virginia*, an EMMY-winning monthly documentary series profiling the culture and history of the region and often Charlottesville specifically; a weekly series profiling charitable organizations in Charlottesville; a local high school quiz show; various local historical documentaries; and Shenandoah Valley's newest series, *Consider This*, which focuses on the unique cultural, political and environmental issues of the region. In addition, the station offers free local airtime to all qualified candidates for public office in Charlottesville, and often

¹⁹ See Consolidated Reply to Oppositions, at 14.

televises community events. The station's efforts extend beyond the TV screen and into the community through outreach services and partnerships with local institutions to address issues of local, national and international importance. For example, Shenandoah Valley has partnered with the Miller Center at the University of Virginia to televise numerous international policy forums with many distinguished guests. WVPT has also partnered with businesses, schools, social service agencies, museums and organizations throughout the community, in many educational and cultural initiatives, including, among others, the "Ready to Learn" and "First Book" programs, which strive to achieve the community's goal of ensuring that all children are adequately prepared for their primary school education.

Assigning channel 64 to CBC, rather than channel 19, would preserve this valuable, local noncommercial programming and simultaneously cause the least disruption to local broadcast operations. The Commission has noted that the reallocation report and order does not expressly preclude the authorization of a new analog television station on channel 60-69, but does mandate that any permitted use would end when the migration to DTV is complete.²⁰ CBC states that its proposed use of channel 19 would similarly terminate when the migration to DTV is complete.²¹ Clearly, for such a temporary use, it would be in the Charlottesville community's best interest for its familiar and existing PBS service to remain in place, rather than to displace Shenandoah Valley, to be replaced by Charlottesville Broadcasting Corporation, which in turn would be displaced by Viacom Inc. The Commission itself has recognized the special circumstances in the Charlottesville area, and has specified in its denial of

²⁰ See Order at ¶4.

²¹ Reply to Viacom Informal Objection, In re Applications of Achnar Broadcasting Company and Lindsay Television, Inc. for Construction Permit for a New Television Station, Channel 64, Charlottesville, Virginia, MM Docket No. 86-440, File No. BPCT 86041KP, File No. BPCT 860410KQ (received September 16, 1998), at 3, n. 1.

reconsideration of the reallocation that its affirmation of the decision not to allow new stations to operate in the reallocated spectrum is without prejudice as to CBC's pending waiver request.²²

While recognizing Charlottesville's need for expanded local service, Shenandoah Valley stresses that its continued existing service on channel 19, in addition, if possible, to another high-powered commercial station on channel 64 is the preferred and equitable option.

Moreover, loss of the W19BB service area would threaten Shenandoah Valley's financial ability to maintain the quality of educational programming it presently provides to at least twenty other communities it serves. Shenandoah Valley's station WVPT (TV) is the smallest public television station in Virginia in terms of both budget and staff, and reaching the Charlottesville/Albemarle community, which represents the highest demographics for income and educational level of all the communities WVPT(TV) serves, is essential to its fundraising efforts. Shenandoah Valley estimates that approximately one quarter of the station's member contributions and thirty percent of retail sales of auctions come from viewers residing in the Charlottesville/Albemarle area. Losing access to that area would cause Shenandoah Valley severe economic harm, which would reverberate across at least an additional twenty counties in Virginia and West Virginia.

Finally, the Commission granted Shenandoah Valley's request to change its DTV allotment assignment from channel 19 to channel 11 specifically for the purpose of protecting its channel 19 translator and its continuing ability to provide quality educational programming.²³ It would be inequitable at this point to deny the logic of that decision through a series of waivers of nearly all relevant rules for allotment and assignment.

²² Memorandum Opinion and Order.

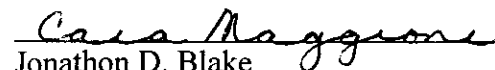
²³ See Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order, MM Docket No. 87-268 at ¶298.

IV. Conclusion

The Commission's decision to delay amendments such as CBC's should stand until the matter has received appropriate consideration. Further, CBC should abide by the procedural protections established to ensure responsible allocation of spectrum. The public's interest in both quality educational programming in Charlottesville and having a voice in the critical decisions about the best use of its scarce spectrum resource dictate that the Commission dismiss CBC's alternative proposal.

Respectfully Submitted,
SHENANDOAH VALLEY
EDUCATIONAL TELEVISION

By its attorneys:


Jonathon D. Blake
Jennifer Johnson
Cara Maggioni
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044-7566
(202) 662-6000

*Counsel for Shenandoah Valley
Educational Television Corporation*

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